IN THE COURT OF APPEALS 05/07/96

OF THE

STATE OF MISSISSIPPI

NO. 94-KA-01105 COA

EDRICK DIXON

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND

MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. MELVIN KEITH STARRETT

COURT FROM WHICH APPEALED: LINCOLN COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

JACK G. PRICE

ATTORNEY FOR APPELLEE:

JOLENE M. LOWRY

DISTRICT ATTORNEY: JERRY RUSHING ASSISTANT DA

NATURE OF THE CASE: TWO COUNTS OF AGGRAVATED ASSAULT

TRIAL COURT DISPOSITION: SENTENCED TO 17 YEARS ON EACH COUNT TO RUN CONCURRENTLY; DEFENDANT TO PAY A $1,000.00 FINE ON EACH COUNT; DEFENDANT TO PAY $500.00 ON EACH COUNT TO THE CRIME VICTIMS FUND

BEFORE FRAISER, C.J., KING, AND SOUTHWICK, JJ.

FRAISER, C.J., FOR THE COURT:

Edrick Dixon was convicted of two counts of aggravated assault in the Lincoln County Circuit Court and sentenced to two concurrent seventeen year terms in the custody of the Mississippi Department of Corrections. On appeal, Dixon asserts that the jury verdict was against the overwhelming weight of the evidence and the trial court erred in denying five of his peremptory challenges. While Dixon's weight of the evidence argument is without merit, we are unable to fully determine the *Batson* issue under the present state of the record*;* therefore, we remand this case for further explanation on the record of the trial court's findings of fact regarding its *Batson* ruling.

FACTS

On September 30, 1994, Edrick Dixon was convicted in the Lincoln County Circuit Court of two counts of aggravated assault for shooting Chris Smith and Jamie Robinson. Because Dixon challenges the weight of the evidence we will briefly recount the testimony adduced at trial. The State elicited testimony from Chris Smith and Jamie Robinson, the two assault victims, that they were shot by Dixon. The State also produced the testimony of three individuals who spoke with Smith and Robinson immediately following the shootings who related that Smith and Robinson both reported being shot by Dixon.

Dixon testified that he did not shoot anyone, but that Demetrius Kelly shot both Smith and Robinson. Dixon also presented the following testimony: Samuel Seals testified that he saw Kelly shoot a pistol in the air prior to the incident in question. Sholanda Palmer testified that Dixon did not have a gun during the shooting but that Kelly did. Further, she testified Kelly shot Smith. Latron Dixon, Dixon's brother, testified that he heard Robinson say Kelly shot him. Latron also testified that he saw Kelly shoot Smith. John Townsend testified that the only person he saw during the incident with a gun was Kelly

Concerning the *Batson* issue, the trial court ultimately denied five of Dixon's peremptory challenges as not being race neutral. During voir dire, the State invoked the *Batson* rule. The prosecutor established that Dixon was a black male and that Dixon's counsel had exercised all five of his peremptory challenges against white males. Therefore, the trial court required Dixon's counsel to present race/gender neutral reasons for each challenge. Dixon's counsel presented the following reasons for his peremptory challenges:

BY MR. PRICE: Mr. Floyd Clark. He seemed to be

looking awful hard at Mr. Dixon. I just -- I strike him

because I didn't think that he would be fair and impartial.

It is not my fault he's a white male. All we have got to deal

with are whites and they are going to be either white

males or white females, Your Honor.

BY THE COURT: The reason is not age or employment status or anything like that? He looked hard at the defendant?

BY MR. PRICE: Yes, sir.

BY THE COURT: What about Robert Easley?

BY MR. PRICE: Your Honor, Mr. Easley had been on a federal criminal jury. I cannot give you an exact reason, I just did not like him, don't want him. I cannot give you a gender specific --

BY THE COURT: I disallow that challenge. D-3, Gary Bales.

BY MR. PRICE: We have no explanation, Your Honor.

BY THE COURT: Disallow that challenge.

BY MR. PRICE: Same with Lewis Mazer. He was on a prior jury, criminal.

BY THE COURT: No other reason?

BY MR. PRICE: No, sir.

BY THE COURT: That was years ago, though.

BY MR. PRICE: Yes, sir.

BY THE COURT: Didn’t he say fifteen years ago?

BY MR. PRICE: I believe so.

BY MR. RUSHING: Your Honor, I don’t believe he made any comments as to whether that was a guilty verdict or a not guilty verdict, either; is that correct?

BY THE COURT: I disallow that challenge. Walter Costilow? If you have some reasons, Mr. Price, I will listen to them.

BY MR. PRICE: Well, we just don’t like him. And he enjoined Batson and Batson requires more than that.

BY THE COURT: All right, disallow that challenge. Let’s go back and look at the panel.

I. WEIGHT OF THE EVIDENCE

Dixon filed a motion in the trial court for a new trial alleging that the verdict was against the overwhelming weight of the evidence. The trial court denied the motion. On appeal, Dixon argues that the trial court erred in refusing to grant his motion and contends that the verdict is against the overwhelming weight of the evidence.

A challenge to the weight of the evidence via a motion for a new trial implicates the trial court's

sound discretion. New trial decisions rest in the sound discretion of the trial court and the motion should not be granted except to prevent an unconscionable injustice. We reverse only for abuse of discretion, and on review we accept as true all evidence favorable to the State. *Wetz v. State*, 503 So. 2d 803, 807-08 (Miss. 1987).

The jury is charged with the responsibility of weighing and considering the conflicting evidence and credibility of the witnesses. *Lewis v. State*, 580 So. 2d 1279, 1288 (Miss. 1991); *Benson v. State*, 551 So. 2d 188, 191 (Miss. 1989); *Dixon v. State*, 519 So. 2d 1226, 1228 (Miss. 1988); *Temple v. State*, 498 So. 2d 379, 382 (Miss. 1986).

At trial, the State elicited testimony from Chris Smith and Jamie Robinson, the two assault victims, that they were shot by Dixon. The State also produced the testimony of three individuals who spoke with Smith and Robinson immediately following the shootings who stated that Smith and Robinson said they were shot by Dixon.

Viewing the evidence in a light most favorable to the verdict, we cannot say that the jury reached the wrong verdict. The trial court did not abuse its discretion in denying Dixon's motion for a new trial. We are not persuaded that the verdict is so contrary to the overwhelming weight of the evidence that to allow it to stand would be to sanction an unconscionable injustice. *Wetz*, 503 So. 2d at 812; *Temple*, 498 So. 2d at 382; *Groseclose v. State*, 440 So. 2d 297, 300 (Miss. 1983).

II. THE BATSON ISSUE

Dixon argues that the trial judge erred by denying five peremptory challenges during jury selection. Our review of the record leads us to conclude that two of the peremptory challenges were correctly denied; however, the record of the trial judge's *Batson* fact findings is inadequate to determine whether the other three peremptory challenges were correctly denied. Dixon argues that he offered sufficiently race-neutral reasons under *Batson* so that all of his peremptory challenges should have been granted. *See Batson v. Kentucky*, 476 U.S. 79 (1986).

In *Georgia v. McCollum*, 112 S. Ct. 2348, 2359 (1992), the United States Supreme Court held that "if the State demonstrates a prima facie case of racial discrimination by the defendants, the defendants must, articulate a racially neutral explanation for peremptory challenges." The trial court must then determine whether the objecting party has met its burden to prove there has been purposeful discrimination in the exercise of the peremptory challenge. *Id.* at 58-59. In *Griffin v. State*, 610 So. 2d 354, 356 (Miss. 1992), the Mississippi Supreme Court acknowledged that *Georgia v. McCollum* applied the *Batson* principle to prohibit the defendant's racially discriminatory use of peremptory challenges.

The standard for reviewing the denial of a peremptory challenge is highly deferential. *See Batson*, 476 U.S. at 98 n.21; *Russell v. State*, 607 So. 2d 1107, 1111 (Miss. 1992). "Determining whether there lies a racially discriminatory motive under the . . . articulated reasons is left to the sole discretion of the trial judge." *Harper v. State*, 635 So. 2d 864, 868 (Miss. 1994) (citing *Lockett v. State*, 517 So. 2d 1346, 1350 (Miss. 1987)). "Race-neutral explanations satisfy *Batson*, but only when they are not a smoke screen which a party is exercising to mask a discriminatory challenge." *Griffin v. State*, 607 So. 2d 1197, 1203 (Miss. 1992). One of the reasons the trial court is granted such deference when a *Batson* challenge is raised is because the demeanor of the attorney making the challenge is often the

best evidence on the issue of race neutrality. *Hernandez v. New York*, 500 U.S. 352, 365 (1991). The credibility of the one making the challenge is often decisive. *Id.* The Mississippi Supreme Court "has adopted the 'clearly erroneous/overwhelming weight of the evidence' standard when reviewing such findings." *Davis v. State*, 551 So. 2d 165, 171 (Miss. 1989); *see also Lockett*, 517 So. 2d at 1350.

The great deference offered to a trial court's Batson findings necessarily requires the trial court to carefully create a record reflecting its reasoning in ruling on *Batson* issues. *Hatten v. State*, 628 So. 2d 294, 298 (Miss. 1993). Specifically, a trial judge must make an "on-the-record, factual determination, of the reasons cited by the [party exercising the challenge] for its use of peremptory challenges against potential jurors." *Id.* If the trial court records these facts on the record, "the guesswork surrounding the trial court's ruling is eliminated upon appeal of a *Batson* issue to this Court." *Id.*

The record reflects that Dixon, a black male, exercised all of his peremptory challenges against white males. The trial court, considering all relevant circumstances, such as a pattern of exercising strikes from the venire on the basis of race and/or gender and the nature of Dixon's questions and statements on voir dire, decided that the State's showing created a prima facie case of discrimination. The burden then shifted to Dixon to come forward with a race/gender neutral explanation for each of the challenges. *Griffin*, 607 So. 2d at 1202; *see also Batson*, 476 U.S. at 97-98; *Davis*, 551 So. 2d at 170; *Chisolm v. State*, 529 So. 2d 630, 632-33 (Miss. 1988); *Johnson v. State*, 529 So. 2d 577, 583 (Miss. 1988); *Dedeaux v. State*, 519 So. 2d 886, 888 (Miss. 1988); *Lockett v. State*, 517 So. 2d 1346, 1349 (Miss. 1987).

The pivotal question, for this Court then, is whether Dixon was able to present a race-neutral explanation for each of his peremptory strikes.

A. Veniremen Bales and Costilow

Applying the proper standard of review to the challenges of veniremen Bales and Costilow, we find that the trial court did not err. Dixon offered no reason to exclude either venireman. Giving no reason cannot be regarded as giving a race-neutral reason; hence, the prima facie case of discrimination was not rebutted. Dixon's peremptory challenges to Bales and Costilow were properly denied.

B. Veniremen Easley and Mazer

As to veniremen Robert Easley and Lewis Mazer, Dixon argues that he offered a valid race-neutral justification for his peremptory challenges to each man in that both had previous jury experience. To be sure, previous jury experience can be a valid race-neutral reason for rejecting a juror. *Harper*, 635 So. 2d at 868. On the other hand, even a valid race-neutral reason may be a smoke screen for a racially motivated strike. *Id.* The record before us is ambiguous as to why the trial judge denied these two peremptory challenges. The only information we have to indicate why Easley was not peremptorily struck is the following:

BY THE COURT: What about Robert Easley?

BY MR. PRICE: Your Honor, Mr. Easley had been on a

federal criminal jury. I cannot give you an exact reason,

I just did not like him, don’t want him. I cannot give you

a gender specific --

BY THE COURT: I disallow that challenge.

The trial judge may have found defense counsel’s brief response a mere pretext. This is possible because during defense counsel’s previous challenge to venireman Clark defense counsel stated "[i]t is not my fault he’s a white male. All we have got to deal with are whites and they are going to be either white males or white females, Your Honor." The trial court may have interpreted this comment by defense counsel to indicate that all defense challenges rested, at least in part, on racially discriminatory reasons. There is also a possibility that the trial judge thought that past jury experience was not a valid race/gender-neutral justification for a peremptory challenge. To decide on this record why the trial judge disallowed Dixon’s peremptory challenge would involve mere guesswork. The *Hatten* Court forbad such guesswork in *Batson* analysis . *Hatten*, 628 So. 2d at 298.

The same vague reasons for the trial judge’s action appear in Dixon’s challenge to venireman Mazer. The putative reasoning advanced by defense counsel follows:

BY MR. PRICE: Same with Lewis Mazer. He was on

a prior jury, criminal.

BY THE COURT: No other reason?

BY MR. PRICE: No, sir.

BY THE COURT: That was years ago, though.

BY MR. PRICE: Yes, sir.

BY THE COURT: Didn’t he say fifteen years ago?

BY MR. PRICE: I believe so.

BY MR. RUSHING: Your Honor, I don't believe he made

any comments as to whether that was a guilty verdict or

a not guilty verdict, either; is that correct?

BY THE COURT: I disallow that challenge. Walter

Costilow? If you have some reasons, Mr. Price, I will listen

to them.

One could surmise from this colloquy that the judge believed that Dixon's allegedly race neutral reason was merely a pretext because Mazer's jury service was in the distant past, and the defense did not elicit whether the prior jury service was in a civil or criminal case. One could also speculate that defense counsel's challenge to venireman Clark was bleeding over into subsequent challenges leading the trial judge to conclude that defense counsel's arguments were all merely pretextual in light of the possible original rase based comment. It is also possible that the trial judge simply thought that past jury service was not an adequate race/gender-neutral justification for a peremptory challenge. Once again, we cannot resolve this case by guesswork. *Hatten,* 628 So. 2d at 298.

C. Venireman Clark

Finally, Dixon argues that venireman Floyd Clark "seemed to be looking awful hard at Mr. Dixon," and that defense counsel thought that Clark would not be impartial. Mississippi has "joined a variety of other jurisdictions in accepting demeanor as a legitimate, race-neutral basis for a peremptory challenge." *Walker v. State*, No. 92-DP-00568-SCT, 1995 WL 598825, at *51 (Miss. Oct. 12, 1995). Here Dixon was clearly challenging the venireman because of his demeanor. The challenge was denied without comment by the trial court.

We recognize that the trial judge may have determined that Dixon's counsel was using the demeanor explanation as a "smoke screen" to conceal his racially or gender motivated challenge; however, if such were the case, the trial judge was required to make such a determination on the record. *Hatten*, 628 So. 2d at 298. He did not.

The challenges to veniremen Easley, Mazer, and Clark all lack a proper on-the-record determination by the trial court of its reasons for denying the peremptory challenges. Therefore, we must remand to the trial court for an in depth effort to develop a more complete record of why Dixon's peremptory challenges were denied. *Hatten* demands no less.

CONCLUSION

While we would vastly prefer to finally settle all issues on appeal, the criminal action before us cannot

be decided on the record as it exists at this time. When the Mississippi Supreme Court decided *Hatten*, it mandated that all trial courts make on-the-record factual determinations of the merits of the reasons offered by a party in support of that party's use of peremptory challenges. *Hatten* 628 So. 2d at 298. In the case at bar, the mandated "*Hatten* findings" evaluating Dixon's reasons for his peremptory challenges of veniremen Easley, Mazer, and Clark were not included in the record. We remand this case to the trial court for the following specific determinations:

> 1. Did the trial court find Dixon's reason for peremptorily challenging Easley to be a pretext or legally insufficient?
>
> 2. Did the trial court find Dixon's reason for peremptorily challenging Mazer to be a pretext or legally insufficient?
>
> 3. Did the trial court find Dixon's reason for peremptorily challenging Clark to be a pretext or legally insufficient?

If the trial court finds that the answer to any of the above questions is that the challenge was legally insufficient or that the trial judge cannot remember, then the trial judge must order a new trial. If the trial court finds that all three of Dixon's challenges were pretextual then the court should enter its complete findings on the record as required by *Hatten v. State*, and certify such findings to this Court by way of a supplementation of the record for appropriate review.

We would finally add that the shortcoming in the record is not a lack of argument by the parties but a lack of articulation of the reasoning behind the trial court's rulings. For that reason we remand this case to the trial judge to explain his reasoning on the record. The trial judge may, if in his judgment it would be helpful to him, order a *Batson* hearing but such is not required by this remand. Regardless of the manner employed in resolving this question the trial court has forty-five days from the date of this decision to either supplement and return the record or order a new trial.

Briefly, the dissent accuses the majority of adhering to the dictates of *Hatten* in a "lemming" like fashion. We remind the dissent that we are an intermediate court of appeals and that "[a] judge's role in an intermediate appellate court is to follow the law, not impose one's personal opinions to change it" or to cause others to exceed established judicial boundaries. *Monroe County v. Pigeon Key Historical Park, Inc.*, 647 So. 2d 857, 861 (Fla. Dist. Ct. App. 1994); *see also* 20 Am. Jur. 2d *Courts* § 201 (1965).

The dissent contends that the record is clear that there were only whites on the panel. This is incorrect. In his brief, Dixon admits that there were three blacks on the panel. Even if there were no blacks on the panel, the record reflects that the *Batson* rule was invoked to require the defense to give gender as well as race-neutral reasons for its peremptory challenges. *See J.E.B. v. Alabama*, 114 S. Ct. 1419, 1421 (1994). Under such circumstances, Dixon would still be required to give gender-neutral reasons for his challenges. *Id.*

Lastly, there was sufficient evidence before the trial court that the judge may have and probably did find the reasons advanced by Dixon in support of his peremptory challenges to be pretextual. The dissent argues that Dixon "has no obligation to prove his challenges were not racially motivated." To be clear, we do not remand for any party to prove anything. We remand so the trial judge may have the opportunity to articulate and explain the reasons for his rulings on the record as required by *Hatten*.

THIS CASE IS REMANDED TO THE LINCOLN COUNTY CIRCUIT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION.

BRIDGES AND THOMAS, P.JJ., BARBER, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR. KING, J., DISSENTS WITH SEPARATE WRITTEN OPINION JOINED BY COLEMAN AND DIAZ, JJ.

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KING, J., DISSENTING:

I respectfully dissent.

The majority would reverse and remand this cause for a supplementation of the record. Specifically, the majority asks the trial court to provide specific factual findings for denying Dixon the right to exercise peremptory challenges against Easley, Mazer, and Clark. The majority states as a basis for this action, lemming like adherence to the mandates of *Hatten v. State,* 628 So. 2d 294 (Miss. 1993).

The record reflects that all *Batson* and *McCollum* issues were discussed and placed before the trial court solely on the issue of race. The record also reflects that when Dixon began his exercise of peremptory challenges, only whites remained in the jury pool. Therefore any challenges exercised would, of necessity, be exercised against whites.

To require Dixon under these circumstances to affirmatively establish that his challenges were not unnecessarily and deliberately directed towards whites is a bit disingenuous. The Defendant has no obligation to prove that his challenges are not racially motivated. Instead he is only required to articulate a race-neutral reason for exercising the challenges. *Georgia v. McCollum,* 120 L.Ed. 2d 33, 51 (1992).

If the State felt that the challenges were in fact predicated upon race, it then bore the burden of establishing that the stated reasons were (1) pretextual and (2) in fact based upon race. *Stewart v. State,* No 92-DP-00921-SCT, slip op. at 5 (Miss. Sept. 28, 1995); *cf. Chisolm v. State,* 529 So. 2d 635, 639 (Miss. 1988) (requiring defendant to show reasons cited by the State were made for racially discriminatory purposes).

The remand of this case for supplementation, under the facts, is at best blind adherence to, and an inappropriate application of the law. The majority's blind adherence to *Hatten*, like the rote migration of the lemming invites misfortune. In the case of the lemming; it is the victim, in the case of this Court someone else is the victim.

I would reverse and remand for a new trial.